Supreme Court, U.S.
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IN THE
Supreme Court of the United States

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, AND ANDREW HAYDEN, *Appellants,*

v.

PEGGY C. KELLEY, et al., *Appellees.*

On Appeal from the United States District Court for the Middle District of Alabama

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JURISDICTIONAL STATEMENT OF DARRYL SINKFIELD, ET AL.

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QUESTIONS PRESENTED

1. Does the three-judge district court's holding that voters who live in majority-white districts can challenge the decision to draw majority-black districts in adjacent areas conflict with this Court's decision in *United States v. Hays*, 515 U.S. 737 (1995)?

2. Did the decision of the three-judge district court in this case conflict with this Court's ruling in *Hunt v. Cromartie*, 526 U.S. 541 (1999), and important First Amendment principles regarding freedom of political association and freedom of political speech, when it held that a redistricting plan crafted and negotiated by leaders of long-established voluntary political organizations was racially, rather than politically, motivated simply because most of the political organizations' members are black?

3. Did the three-judge district court's majority err in refusing to accord preclusive effect to a state trial court's findings and adverse judgment on the merits against the *Shaw v. Reno* claims of persons acting in privity with these plaintiffs and to the Alabama Supreme Court's decision in *Rice v. Sinkfield*, 732 So.2d 993 (Ala. 1999), which dismissed the appeal of plaintiffs' privies as moot?

4. Did the three-judge district court err in refusing to dismiss plaintiffs' claims on grounds of laches?

5. Is the three-judge district court's finding that race was the predominant factor in the design of the challenged legislative districts clearly erroneous?

PARTIES

The following were parties in the Court below:

Plaintiffs:
Kelly Brasher (voluntarily dismissed)
Daniel P. Brown
Bibb Gunter
Ann G. Hunter (voluntarily dismissed)
Peggy C. Kelley
Gonzalo F. Montiel
W. Ricardo Montiel
Karen D. Outlaw
Camilla Rice
John Rice
Genae Spinks
Andrew D. Thompson

Defendants:
James Bennett, the Secretary of State of Alabama
Bernest Brooks
Andrew Hayden
Rubin McKinnon
Quinton Ross
Darryl Sinkfield
Hal Smith, Probate Judge of Lee County, Alabama (dismissed by plaintiffs)
State of Alabama

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JURISDICTIONAL STATEMENT ON BEHALF OF THE SINKFIELD APPELLANTS

Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon and Andrew Hayden, on behalf of themselves and the class of African-American voters they are certified to represent in *Sinkfield v. Bennett*, Civil Action No. 93-689-PR (Cir. Ct. Montgomery County, Ala.), appeal from the final judgment entered by the three-judge United States District Court for the Middle District of Alabama on April 24, 2000, which declares that House Districts 63, 75 and 86, and Senate Districts 21, 25, 29 and 30 in the redistricting plan adopted by the state court in *Sinkfield v. Bennett, supra*, violates the Fourteenth Amendment to the United States Constitution and enjoins further elections in those districts under that plan.

OPINIONS BELOW

The April 24, 2000, opinion and judgment of the three-judge district court are reported at *Kelley v. Bennett*, __ F.Supp.2d __, 2000 WL 508748 (M.D. Ala. 2000), and appear in the Appendix to the Jurisdictional Statements filed jointly for this appeal and the appeal styled *James Bennett, etc. et al v. Peggy Kelley, et al.* ("J.S. App.") at 85a. Previous decisions of earlier phases of this and related litigation are reported at *Thompson v. Smith*, 52 F.Supp.2d 1364 (M.D. Ala. 1999); *Sinkfield v. Rice*, 732 So.2d 993 (Ala. 1998); and *Rice v. Smith*, 988 F.Supp. 1437 (M.D. Ala. 1997).

JURISDICTION

The judgment of the court below was entered on April 24, 2000. The Sinkfield Appellants filed their notice of appeal to this Court on May 23, 2000. J.S. App. 94a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and the First Amendment, both reproduced at J.S. App. 373a.

STATEMENT OF THE CASE

In one forum or another, the districts from which the Alabama Legislature is elected have been the subject of litigation since 1993. The nature of the procedural history is critical to understanding why this Court should note probable jurisdiction, and so we set it out in some detail.

A. PROCEDURAL HISTORY

The current districts of the Alabama Legislature are the product of a state-court consent decree in 1993. *See Sinkfield v. Camp,* CA No. 93-689-PR (Cir. Ct. Montgomery County, May 12, 1993), J.S. App. 126a-136a. The plan is commonly referred to as the "Reed-Buskey" plan – in honor of Dr. Joe Reed and the late John Buskey, a black state legislator, two of the plan's architects. The consent decree had been negotiated by the Alabama Secretary of State – the state's chief election officer – who was represented by the Attorney General of Alabama, and by Darryl Sinkfield and four other black citizens, who were certified to represent a plaintiff class of all African-American citizens of Alabama and who had alleged that the failure of the Alabama Legislature to adopt a new redistricting plan after the 1990 census violated their rights under the Voting Rights Act and the Fourteenth and Fifteenth Amendments. J.S. App. 126a-131a. After entering the consent decree, the Montgomery County Circuit Court retained jurisdiction.

This action was commenced by John and Camilla Rice on May 2, 1997. J.S. App. 97a-139a. Their complaint attacked the entire Reed-Buskey plan. The Rices, who resided in Lee

County, alleged in three counts (1) that the overall population deviation violated the one-person, one-vote rule, (2) that many districts were racially gerrymandered in violation of *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), and (3) that systematic overpopulation of the majority-white districts diluted the voting strength of non-blacks. The Rices sought to represent a plaintiff class of all non-black voters in Alabama, and they asked that the Sinkfield plaintiffs in the state court action, named by the Rices as defendants in federal court, be certified to represent a defendant class of all black voters. The relief requested was a redrawing of the whole Reed-Buskey plan. J.S. App. 124a.

Parallel Proceedings In State and Federal Courts: On August 14, 1997, the federal district court directed the Rices to move to intervene in the pending state court action, *Sinkfield v. Bennett.* The federal court recognized that the state court had retained jurisdiction of its decree adopting the redistricting plan and that principles of federalism announced in *Growe v. Emison*, 507 U.S. 25 (1993), required it to give the state court the first opportunity to hear the Rices' claims that its plan was unconstitutional. The Rices added to their federal complaint nine additional plaintiffs (the Thompson plaintiffs), residing in eight additional counties, challenging nine additional House districts and eight additional Senate districts. Doc# 35, 40.[1] Only the House and Senate districts in which Andrew Thompson resided were majority black.

The newly added plaintiffs in the Rices' lawsuit, who were represented by the same counsel as the Rices, declined the state court's invitation to intervene and present their claims along with the Rices. J.S. App. 138a. After a full trial on the merits, the state court issued its ruling on November 20, 1997, rejecting all three of the Rices' constitutional claims. Doc# 94, State Exh.

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[1] "Doc# __ refers to the document number assigned on the district court docket sheet.

26.[2] It restricted the Rices' *Shaw* challenges to the Lee County districts in which they resided and found that politics, not race, was the predominant factor in those districts' construction. *Id.* at 10-12. The state court found that the plan had strong support in the House, and with "no influence or input by the United States Attorney General or the U.S. Justice Department," the Alabama Attorney General and Secretary of State agreed to have the Reed-Buskey Plan adopted in a consent decree. *Id.* at 6-7.

The state court found that race was not used as a proxy for political affiliation but reflected the actual interests of black citizens expressed through the leaders of their own political organizations. The Alabama Democratic Conference, the Jefferson County Citizens' Coalition, and the Alabama New South Coalition "represent the political interests of over 80% of the black voters in Alabama." *Id.* at 7. The court found that these organizations were the product of black Alabamians' "free political association," and that the efforts of their leaders to obtain districts which would elect their preferred candidates were protected by the First, Thirteenth, Fourteenth and Fifteenth Amendments, so that, like other politically designed districts, the majority-black districts which the leaders of these groups sought were not subject to strict scrutiny. *Id.* at 15-16.

The Rices appealed the circuit court's ruling to the Alabama Supreme Court in late 1997. In light of the circuit court's full and fair hearing of the Rices' federal claims, the federal district court dismissed the Rices' claims on grounds of res judicata and the *Rooker-Feldman* doctrine.[3] J.S. App. 187a. But the district court did not rule on defendants' motions to

[2] At trial, exhibits were designated as "Plaintiff," "State," or "Sinkfield."

[3] *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923).

dismiss the Thompson plaintiffs' claims, Doc# 96, 98. Instead it stayed them once again in deference to the state court, which "has indicated not only its willingness to entertain challenges to Alabama's redistricting plan, but also its ability to resolve such claims in an exigent manner." J.S. App. 187a. The Thompson plaintiffs still refused to present their claims in state court, either by filing a new suit or by intervening in *Rice*.

On December 18, 1998, the Alabama Supreme Court dismissed the Rices' appeal as moot. *Rice v. Sinkfield*, 732 So.2d 993 (Ala. 1998), J.S. App. 197a. In a per curiam opinion the Court held that the November 1998 regular elections had rendered the appeal moot, because the Legislature would be redistricted before the next regular elections in 2002. J.S. App. 198a-199a. The Rices did not seek certiorari from this Court.

Proceedings In Federal Court After Final Disposition of State Court Proceedings: The district court converted the motions to dismiss into motions for summary judgment, and on July 2, 1999, dismissed the Thompson plaintiffs' one-person, one-vote and vote dilution claims on grounds of res judicata, but it held that all but one of their *Shaw* claims were not barred by the state court judgment. J.S. App. 201 *et seq.*

The district court found that there was a substantial identity between the Rices and the Thompson plaintiffs, so that the Thompson plaintiffs' statewide claims were barred under Alabama's principles of claim preclusion. J.S. App. 206a-213a. Similarly, because Andrew Thompson lived in the same Senate district as the Rices, his *Shaw* challenge to that district was barred. But the district court held that the *Shaw* challenges to the remaining districts were not barred, since, under *United States v. Hays*, 515 U.S. 737, 744-45 (1995), the Rices had lacked standing to challenge districts in which they did not reside. J.S. App. 214a-218a.

On the eve of trial, the district court ruled on pending dispositive motions. It denied, without providing reasons, the motions for summary judgment with respect to the claims of plaintiffs Outlaw, Gunter, Ricardo Montiel, and Spinks, Doc# 290-91, 300, 302, 304, 309-11, and the Senate district claims of plaintiffs Kelley, Gonzalo Montiel, and Brown. Doc# 290, 303, 304. It granted, with opinions, summary judgments against the House district challenges of Kelley, Thompson (the sole remaining majority-black district in the case), Brown, and Gonzalo Montiel. J.S. App. 219a-243a, Doc# 308. None of the district court's summary judgment rulings addressed the defenses of claim and issue preclusion, lack of standing, laches or absence of proof of personal harm to the plaintiffs. Where summary judgment was granted, the court reached the merits and found that the plaintiffs could not demonstrate that race was the predominant factor in the designs of their House districts. J.S. App. 224a-225a, 230a-234a, 242a-243a. It found there was no evidence that Dr. Reed's agenda to increase the number of districts controlled by his black constituents was the principal motive for the construction of these majority-white districts. *Id.* It rejected Daniel Brown's argument that his House district was "too white," because it would have been a majority-white district under any set of traditional districting principles, and because Brown's contention that the creation of majority-black districts produced "segregation" in adjoining majority-white districts had been rejected by this Court in *Hays*. J.S. App. 237a, *citing* 515 U.S. at 746.

The District Court's Final Decision: A trial on the merits was conducted on January 18-25, 2000. On April 24, 2000, the three-judge court, with one judge dissenting, rejected all defenses based on standing, laches, claim or issue preclusion, and black voters' freedom of political association and upheld the *Shaw* claims against three House districts and four Senate districts. J.S. App. 1a-90a. The court's opinion is summarized as follows:

Standing: The district could held that *United States v. Hays* does not restrict *Shaw* standing to residents of those legislative districts which are the "primary focus" of the alleged racial gerrymandering. Plaintiffs here met all standing requirements to obtain a decision on the merits merely by challenging the boundaries of the districts in which they reside. They needed only to show that "ripple effects" from the creation of majority-black "target" districts "had a significant enough effect on the configuration of the challenged [majority-white] district" to render their own districts also "racially gerrymandered." J.S. App. 14a-15a.

The district court further held that "injury-in-fact is conclusively presumed from the mere fact of residence in a gerrymandered district, independent of the plaintiff's subjective assessment of harm." J.S. App. 7a. The plaintiffs' admissions that they personally were not injured – for example, that they were satisfied with their state senator and did "not live near a part of the district where borders are racial" – were irrelevant. J.S. App. 6a. In the district court's view, the "essence" of a *Shaw* claim is the constitutional harm caused by the "act of segregation." J.S. App. 14a.

Laches: The district court held that the Thompson plaintiffs acted in timely fashion by filing this federal action in 1997, before the last legislative elections in 1998. (The court did not discuss the Thompson plaintiffs' decision to wait at least year and a half thereafter for the state courts to resolve the Rices' *Shaw* claims and their refusal to present their own claims in state court.) The district court also rejected the contention that the State was prejudiced by any delay, in light of its refusal to order mid-term elections and its limitation of injunctive relief to prohibiting use of the seven unconstitutional districts in the future. J.S. App. 8a-9a.

Issue Preclusion: The district court failed to address the preclusive effect of the state trial court's findings of fact with

respect to the essentially political, rather than racial, nature of the Reed-Buskey plan. It held that the Alabama Supreme Court's ruling that the Rices' *Shaw* claims were moot did not bind the Thompson plaintiffs, because in the district court's view, the Alabama Supreme Court had limited its consideration to relief requested before the 1998 regular election and did not address the possibility of later special elections.

Black Voters' Freedom of Political Association: The district court did not squarely dispose of the Sinkfield defendants' contention that the challenged plan reflected a constitutionally protected exercise of their First Amendment rights. But in the course of ruling on the merits of the Thompson plaintiffs' claims, it made the following salient findings of fact. The district court found that Dr. Reed acted in the interests of members of the Alabama Democratic Conference ("ADC"); that the ADC, New South Coalition ("ANSC"), and Jefferson County Citizens' Coalition ("JCCC") are "organized to advance black political interests;" and that these organizations represent the overwhelming majority of black voters in Alabama.[4]

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[4] The ADC is well-organized and influential. Its local, county-based chapters run get-out-the-vote campaigns to maximize black-voter participation; recruit and investigate candidates; distribute sample ballots marked with ADC-endorsed candidates; and provide voting assistance and monitoring on election days. In most races, ADC-endorsed candidates (who are always Democrats) carry a large majority of the black vote. In the 1994 Democratic primaries for the state legislature, ADC-endorsed candidates won a majority of the contested races for both the house and the senate. Thanks to the efforts of the ADC, the NSC, and other such groups, black-voter participation rates in Alabama are often comparable to, if not higher than, white rates

The ADC, NSC, and other groups are well represented in the present Alabama legislature. Only one black senator is "independent"; the other seven are affiliates of either the ADC, (continued...)

Notwithstanding these findings, the court rejected the contention that the efforts of Dr. Reed and his political allies to aggregate ADC voters in districts constituted political rather than impermissible racial gerrymandering. It based its ruling on the fact that ADC, like the Democratic and Republican Parties in Alabama, does not require its supporters to register as members, so that "[i]t is thus impossible to know precisely where ADC supporters live without relying on proxies such as race or Democratic voting habits as reflected in election returns." J.S. App. 26a. Since Dr. Reed used block-level census data, the court concluded, he "relied upon race as a proxy to measure local ADC strength."[5] J.S. App. 26a.

The Merits: The district court found that the Reed-Buskey Plan "was the brainchild of Dr. Joe Reed," who was treated by the court as "the districter," because he exercised "overriding decisional power over the district outlines" in his negotiations with legislators. J.S. App. 20a-21a and n.15. Dr. Reed's "global strategy" was to "maximize" the number of majority-black districts by converting some "integrated" districts, defined as having "a near 50-50 split of black and white population, or having a large black minority," into "ideal happy-medium" districts, with "a population between 60 and 70% black," in which black votes were not "wasted" but the votes of white "filler people" were. J.S. App. 21a-22a. The district court held that seven of the challenged majority-white districts, HD 63,

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[4](...continued)
the NSC, or the JCCC. In the house of representatives, the ADC counts twelve affiliates, the NSC an overlapping five, and the JCCC five; there are only three "independents."

J.S. App. 25a.

[5] The district court did not consider whether its "proxy" finding was precluded by the squarely contrary fact finding of the state trial court. See *supra* at page 4.

75, and 86, and SD 21, 25, 29, and 30, violated *Shaw* because their boundaries were sufficiently influenced by Dr. Reed's attempts to draw adjoining majority-black districts. J.S. App. 26a-45a. It rejected challenges to two other districts, HD 89 and SD 34, because the boundaries of those districts were not sufficiently influenced by the creation of targeted majority-black districts. J.S. App. 43a, 45a.

In reaching its conclusions on the districts it struck down, the district court rejected the testimony of legislators and other witnesses supporting alternative explanations based on preserving non-geographical communities of interest and protecting incumbents. J.S. App. 46a-47a. Mathematical measures of compactness offered by defendants' expert were "undermined by [their] disagreement with common sense." J.S. App. 47a. The court used "an eyeball test" to determine that some districts had bizarre shapes. J.S. App. 48a. However, in every instance, the court below based its findings of predominantly racial motives primarily on Dr. Reed's global strategy of preserving and increasing the number of majority-black districts. J.S. App. 26a-45a. Because the defendants based their entire defense on the contention that impermissible racial considerations were not predominant factors in the designs of the challenged districts, there were no compelling state interests for the district court to assess under the strict scrutiny standard. J.S. App. 49a-50a.

Remedies: The district court issued an injunction against use of the unconstitutional majority-white districts in any future special elections and an award of attorneys' fees. J.S. App. 51a, 53a-54a. It rejected plaintiffs' requests that the State be enjoined from using the offending districts as baselines under § 5 of the Voting Rights Act in post-2000 redistricting or that an interim plan be drawn either by the State or by the federal court. J.S. App. 51a-54a.

B. Statement of the Facts.

Alabama's Predominantly Black Political Organizations: Dr. Joe L. Reed was chief negotiator and architect of the redistricting plans for the Alabama Legislature adopted after both of the last two decennial censuses. He successfully negotiated the plan which passed the Legislature in 1983 as Act No. 83-154 and which was approved by the three-judge federal court in *Burton v. Hobbie*, 561 F.Supp. 1029 (M.D. Ala. 1983) (3-judge court). Tr. 16-23 (Jan. 18).[6] He brokered the Reed-Buskey plan currently under attack, which passed the House in slightly modified form and was adopted by the state court in 1993 as a consent decree. Doc# 94, State Exh. 26, pp. 5-6; Plaintiffs' Exh. 226, pp. 4-9; Tr. 39-47 (Jan. 18); Sinkfield Exh. 194, pp. 441-46, 451-52, 467-68.

Dr. Reed is not himself a member of the Legislature. He is a member of the Democratic State Executive Committee and of the Democratic National Committee.[7] Tr. 2-3 (Jan. 18). But his influence over the redistricting process comes primarily from his position as Chairman of the Alabama Democratic Conference and from ADC's ability, along with the Alabama New South Coalition and the Jefferson County Citizens' Coalition, to deliver the support of the vast majority of African-American voters to candidates those organizations endorse for the Legislature and for most other elective offices in Alabama. Sinkfield Exh. 185, p 8; Sinkfield Exh. 194, pp. 441-43.

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[6] Citations such as this are to the transcript page number and date of the testimony at the January 2000 trial.

[7] This Court can take judicial notice that on June 17, 2000, after the district court's decision was issued, Dr. Reed was chosen by the Alabama Democratic Party to be chairman of the state's delegation to the Democratic National Convention in August. Montgomery *Advertiser*, June 18, 2000, <http://www.montgomeryadvertiser.com/news/local/stgovt/061800_demos.htm> (visited July 19, 2000).

ADC, ANSC and JCCC are the heirs of a long tradition in Alabama of African Americans organizing themselves to influence the political process. During the first half of the twentieth century, when all but a very small percentage of black citizens were disfranchised, they established local political organizations, like the Montgomery Improvement Association, which sponsored the Montgomery Bus Boycott that began the Civil Rights Movement, the Tuskegee Civic Association, which sponsored *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and Mobile's Nonpartisan Voters' League, which sponsored *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Tr. 695 (Jan. 20); Sinkfield Exh. 187, p. 2; Sinkfield Exh. 177, pp. 29-33. In 1960, prompted by John F. Kennedy's campaign, leaders of these local organizations, including Charles Gomillion of Tuskegee, Rufus Lewis of Montgomery, Arthur Shores of Birmingham, Q.D. Adams of Gadsden, and John LeFlore of Mobile, formed the Alabama Democratic Conference. Tr. 695-96 (Jan. 20); Sinkfield Exh. 187, p. 2; Sinkfield Exh. 177, pp. 29-33.

ADC remains active today with local, dues-paying chapters in more than 50 of Alabama's 67 counties and a statewide organization with a permanent staff in Montgomery. Sinkfield Exh. 185, p. 6; Tr. 925-26 (Jan. 21, 2000). In the words of one expert political scientist, "the Alabama Democratic Conference is a functioning political party–in all but name only–at the state and local level in Alabama." Sinkfield Exh. 185, p. 5. It is a political organization open to Alabama citizens of all races, although its membership is overwhelmingly black. Sinkfield Exh. 118. The ADC has a formal charter and by-laws, a membership that elects officers at the state and local level, and regular meetings, including semi-annual statewide conventions, where candidates for state and federal offices are screened and endorsed. Sinkfield Exh. 185, p. 6; Tr. 921:18-923:15 (Jan. 21, 2000); Sinkfield Exh. 119. ADC raises campaign money, organizes voter registration and get-out-the-vote efforts, and circulates its yellow sample ballot endorsing candidates (white

and black) in most state and local elections. Sinkfield Exh. 185, p. 5-8; Sinkfield Exh. 126-30. Its staff, officers and affiliated elected officials pursue a common political agenda in day-to-day politics between elections. Sinkfield Exh. 185, p. 7; Sinkfield Exhs. 118, 120-21, 123-24, 141; Tr. 921:18-923:15 (Jan. 21, 2000).

The Jefferson County Citizens' Coalition and the Alabama New South Coalition also operate as functional political parties. Sinkfield Exh. 194, pp. 141-42. The objective of all three organizations is to include African Americans more actively and effectively in mainstream politics, not to separate them. Neither ADC, ANSC nor JCCC has sought ballot access in its own name for fear of isolating black citizens in the political arena. Sinkfield Exh. 185. Taken together, as the expert historian testified, the ADC, ANSC and JCCC "represent the perception among African-Americans that they have common political interest and that they should act in common to pursue this interest." Tr. 696 (Jan. 20).

The Politics of Legislative Redistricting: One important way in which ADC, in consultation with leaders of ANSC and JCCC, seeks to advance the political interests of its constituents, "[l]ike other political parties, [is] to use the reapportionment process to distribute (in legislative districts) their likely supporters–and opponents–to their advantage...." Sinkfield Exh. 185, p. 7. ADC's leaders know from years of analyzing election returns where their constituents, almost all of whom are African Americans, reside. Sinkfield Exh. 185, p. 7 and n.9; Sinkfield Exh. 177, pp. 74-77. When Dr. Reed participated in drawing both the 1983 and 1993 plans, one of his objectives was to aggregate these predominantly black constituencies in various ways that would advance ADC's goal of equitable representation for blacks "in every chamber of the government in Alabama" and to elect white Democrats who were sympathetic to ADC's political agenda. Tr. 30, 81-82, 159 (Jan. 18); Sinkfield Exh. 185, p. 7. "[Equitable representation

for blacks] is the thing that we have been working on," Dr. Reed testified. "And that is what our organization exists for. That is what we marched for." Tr. 30 (Jan. 18). Local ADC members testified that they look to Dr. Reed to represent their interests in the legislative redistricting process. Tr. 396-97, 410 (Jan. 19).

Dr. Reed has been Chairman of ADC since 1970, Sinkfield Exh. 177, pp. 41-42, and over the years he has developed considerable credibility and influence as a lobbyist for his constituents in the Legislature. He is respected even by his political opponents. His approach to redistricting has been to gain the support of the black caucus and enough members of the Legislature to achieve passage of the plans he favored. Tr. 43-47 (Jan. 18). But he always started by winning the support of the leadership, "the movers and shakers in the legislature." Tr. 43 (Jan. 18).

In 1983, Dr. Reed's chief redistricting ally was Democratic Senator Lister Hill Proctor, the Chairman of the Legislative Reapportionment Committee. Tr. 17 (Jan. 18). In 1993, it was Democrat Jimmy Clark, the powerful Speaker of the House. This black-white coalition produced a legislative victory in 1983 through passage of Act 83-154. But a standoff in 1993 between Speaker Clark and Ryan deGraffenried, President Pro Tem of the Senate, prevented the Reed-Buskey Plan, which passed in the House, from getting out of committee in the Senate. Plaintiffs' Exh. 226, pp. 5-6; Tr. 46-47 (Jan. 18); Sinkfield Exh. 177, pp. 98-99. However, Speaker Clark's influence with Secretary of State Billy Joe Camp and Attorney General Jimmy Evans, both of whom were Democrats, afforded Dr. Reed the political leverage to negotiate the 1993 state court consent decree adopting the Reed-Buskey Plan. Sinkfield Exh. 194, 167-68; Sinkfield Exh. 177, pp. 101-02.

Speaker Clark was in "a life or death struggle" to save his seat and to deflect a concerted effort to oust him as Speaker.

Sinkfield Exh. 194, pp. 440-44. Consequently, the starting point and inviolable linchpin of the Reed-Buskey Plan was House District 84, which Speaker Clark insisted should include all of Barbour County, his home county, and enough of the rural portions of Henry County to satisfy population equality. Tr. 169, 180, 210 (Jan. 18); Sinkfield Exh. 194, pp. 444-46, 451-52. Since Speaker Clark's HD 84 is bounded on the east by the Georgia state line, the Reed-Buskey Plan's design rippled westward across the southern half of Alabama. Other driving factors were the demographic realities that population generally had shifted further from rural to urban areas and that many districts, including all the majority black districts in the 1983 plan, had become more than five percent underpopulated after the 1990 census. It became necessary to extend rural districts deeper into urban areas to satisfy the population equality requirement. Sinkfield Exh. 194, pp. 443-44. Facts regarding the specific districts found unconstitutional by the district court are summarized in the jurisdictional statement of the State of Alabama.

REASONS FOR NOTING PROBABLE JURISDICTION

This case raises extremely significant questions of federal constitutional law and procedure that merit plenary review by the Court.

This Court made clear in *United States v. Hays*, 515 U.S. 737 (1995), that the cause of action first delineated in *Shaw I* is not a general license for any individual who dislikes the way a state has redistricted itself to seek wholesale federal judicial review. *Shaw* does not suspend Article III of the Constitution and the core requirement that plaintiffs have standing to sue. Only individuals who "live in the district that is the primary focus of their racial gerrymandering claim" or have "otherwise demonstrated that they, personally, have been subjected to a racial classification," *Hays*, 515 U.S. at 739, have the requisite standing.

In this case, the district court turned *Hays* into a dead letter. It permitted a group of plaintiffs to challenge the creation of majority-black state legislative districts in which they do not reside by the formalistic procedural expedient of purporting to challenge adjacent majority-white districts in which they do live. Bringing to mind John Donne's aphorism that no man is an island, the district court accorded standing on the basis of a "ripple effect." Under the district court's approach, *Hays* becomes a case not about standing, but simply about pleading. The district court's approach provides no logical stopping place: the requirement of one-person, one-vote means that *every* decision to draw a district including some people requires drawing lines that exclude others. Particularly in the sensitive area of how the political process is structured, this Court has repeatedly expressed concern that plaintiffs' claims can "rationally be cabined." *City of Mobile v. Bolden*, 446 U.S. 55, 78 n.26 (1980). The district court's unprecedented "ripple effect" jurisprudence cannot.

The district court's new rule has particularly pernicious consequences for federalism and democratic self-governance. This Court has repeatedly recognized that "the Constitution leaves with the States primary responsibility for apportionment of their ... state legislative districts." *Growe v. Emison*, 507 U.S. 25, 33 (1993); *see also Chapman v. Meier*, 420 U.S. 1, 27 (1975). *Shaw I* and its progeny were never intended to subvert this fundamental principle of federalism and democratic self-governance. Yet that is precisely what the decision in this case does.

The Alabama redistricting process at issue in this case is the epitome of healthy politics. It reflects the practice of grass-roots, interracial, coalition building to which constitutional law aspires. In *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994), this Court urged minority voters to "pull, haul and trade" to secure legislative representation. That is precisely what ADC did. But the district court treated the very process of open

political negotiation that led to settlement of the state court litigation, and implementation of the districting plan now attacked by plaintiffs in this case, as evidence of unconstitutional racial gerrymandering. Essentially, the district court held that political associations composed predominantly of individual black voters may not exercise the political freedom every other group of voters enjoys to seek districts that provide them an opportunity to elect the candidates they prefer. *Shaw* principles, like the Voting Rights Act, are meant to defeat racism; but the district court's wooden application of those principles operates to undermine the virtues of common-ground politics and thus is inconsistent with the teaching of *DeGrandy*.

The lower court's lack of regard for protecting political speech and free association puts the First Amendment on a collision course with this Court's *Shaw* jurisprudence. Its expression of no confidence in Alabama's redistricting process and its total disrespect of explanations given by members of the Legislature for their political bargains set the federal court up as the sole redistricting authority. Its creation of a new "substantial ripple effect" standard of proof untethers judicial oversight of legislative redistricting discretion from principled limits. It flouts Justice O'Connor's observation in *Miller v. Johnson*, 515 U.S. 900, 928-29 (1995), that "certainly the [*Shaw*] standard does not treat efforts to create majority-minority districts less favorably than similar efforts on behalf of other groups."

The district court's decision comes on the eve of a new round of decennial redistricting of federal, state and local legislative bodies all over the United States. If the district court's ruling is allowed to stand, any voter, regardless of his or her race, residing anywhere in the state or local jurisdiction, will be entitled to demand plenary consideration of all the evidence he or she can assemble to contend that conscious efforts to aggregate African-American or Latino voters anywhere in the state, regardless of their common political

affiliations, have had a significant enough ripple effect on the plaintiff's own district to establish a *Shaw* violation. The decision below opens wide the litigation floodgate this Court clearly intended to shut off in *United States v. Hays* and its subsequent standing decisions.

The district court's decision raises substantial federal questions concerning comity and respect for state-court judgments in the exquisitely complex and political context of redistricting. In particular, the court's approach in this case conflicts with the approach taken by other federal courts in addressing questions of preclusion and laches.

Finally, this case presents an important opportunity for this Court to clarify, before the next round of redistricting and redistricting-related litigation, how *Shaw v. Reno* and its progeny should be applied in the context of a state legislature, where local-level politics play a more immediate and intimate role in redistricting negotiations than they do in the Congressional redistricting cases to which this Court has given plenary consideration.

I. This Court should note probable jurisdiction to correct serious legal errors with regard to the requirements for standing under *United States v. Hays*.

A. *Hays* establishes a substantive threshold for establishing standing, requiring plaintiffs to plead, and prove, personal injury; it is not merely a rule of pleading that requires plaintiffs to identify the district they are challenging.

The three-judge court majority acknowledged that all the plaintiffs resided in "majority-white districts that are next door to engineered minority 'safe seats,'" and that "[t]his case is different from any among the *Shaw* cases," because none of these plaintiffs "resided in the majority-black or majority-

Hispanic district that was the target and goal of the racial gerrymander...." J.S. App. 5a, 13a. The analysis of *United States v. Hays*, 515 U.S. 737 (1995), the district court performed to justify its conclusion that the plaintiffs adequately alleged and proved standing to challenge their own districts under these circumstances obviously misinterprets and erroneously attempts to extend the *Hays* principles.

Hays addresses the three elements which establish "the irreducible constitutional minimum of standing" under Article III of the Constitution: injury in fact, that is causally connected to the conduct complained of, and that is judicially redressable. 515 U.S. at 742-43 (citations omitted). The court below properly focused on the first element, injury in fact, J.S. App. 5a, which requires evidence that the plaintiff has suffered "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Hays*, 515 U.S. at 743 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). But the concept of injury the district court settled on is dangerously confused, and this confusion necessarily infected its analyses of both standing and the merits.

Hays identified the harms caused individuals by a *Shaw* violation as stigmatic ("racial hostility" because of "their membership in a racial group") and representational (elected officials "are more likely to believe that their primary obligation is to represent only the members of [one] racial group"). 515 U.S. at 744 (*quoting Shaw I*, 509 U.S. at 643, 648). The three-judge court majority duly noted this explanation and the scholarly controversy it has provoked with respect to the standing issue. J.S. App. 4a-5a. But it focused on the next paragraph in *Hays*, which says that a *Shaw* plaintiff "has standing to challenge the legislature's action" if she "resides in a racially gerrymandered district...." 515 U.S. at 745 (citation omitted). Overlooking the next sentence that "[v]oters in such districts **may** suffer the special representational harms

racial classifications can cause in the voting context," *id.* (emphasis added), the court below interpreted *Hays* to mean "that injury-in-fact is **conclusively** presumed from the mere fact of residence in a gerrymandered district, independent of the plaintiff's subjective assessment of harm." J.S. App. 8a (emphasis added).

The lower court's reasoning is palpably wrong. *Hays*' limitation of standing to plaintiffs who reside in the districts that are "the primary focus of their racial gerrymandering claim," 515 U.S. at 739, is not, as the court below surmised, merely a requirement that plaintiffs specify in the complaint the challenged districts. That would make *Hays* little more than a formalistic speed bump on the road to challenging any district. Where, as here, the trial court finds from the evidence that the districts in which plaintiffs reside simply border "targeted black-majority districts," J.S. App. 22a, and where there is no "specific evidence tending to support [an] inference" that plaintiffs suffer any "special representational harms" caused by racial considerations, they have not sustained their burden of proving standing. 515 U.S. at 745. Whatever harm the ripple effects allegedly cause plaintiffs is not "a direct result of having *personally* been denied equal treatment," and their complaints are simply nonjusticiable generalized grievances. 515 U.S. at 746 (*quoting Allen v. Wright,* 468 U.S. 737, 755 (1984)) (emphasis added in *Hays*).

B. The plaintiffs never claimed to have suffered any of the standing-conferring injuries identified by this Court in *Shaw* and *Hays*.

The evidence in the trial below showed that none of the plaintiffs even claimed personally to suffer any of the stigmatic or representational harms identified in *Hays*. None testified he or she felt stigmatized by the alleged racial gerrymandering, none had any problem with the representation provided by his or her legislators, none actually resided in or near the particular

boundaries of their districts claimed to have racial designs, and none contended that the racial composition of his or her district was the target of the alleged racial designs. The district court majority's conclusion that this evidence is irrelevant, because *Shaw* jurisprudence conclusively presumes injury in fact and bestows standing upon every resident of "a racially gerrymandered district," J.S. App. 7a, is flatly inconsistent with the *Hays* opinion itself and the authorities it relies on.

Hays relies on *Allen v. Wright*, where this Court squarely rejected the sufficiency of the black plaintiffs' allegation that the grant of tax-exempt status to racially discriminatory private schools in other states inflicted a justiciable stigmatic injury upon them personally. Only citizens who "carry the burden of proving their standing, as well as their case on the merits," may maintain a *Shaw* challenge. *Hays*, 515 U.S. at 746. The requirement that the plaintiff demonstrate some personal injury not shared by all other citizens "has a core component derived directly from the Constitution." *Allen*, 468 U.S. at 751. It is a "fundamental limit[] on federal judicial power in our system of government." *Allen,* 468 U.S. at 750.

The requirement that a plaintiff prove that he or she personally has been harmed applies to everyone. Even those who reside inside a district that is the primary focus or target of attempts to produce a black majority or other particular racial composition must carry this burden at trial. *Hays*, 515 U.S. at 743. "The Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. __, __ (May 22, 2000), slip op. at 4-5 (*quoting Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (emphasis added in *Vermont Agency*). The district court's interpretation of *Hays,* the irrebuttable presumption of personal harm it mistakenly found there, combined with its belief that conveying a message of racial political identity is the overriding *Shaw* injury, effectively created a *qui tam* cause of action, without

any congressional authorization: it authorized plaintiffs to sue not on their own behalf, but rather to vindicate some perceived, albeit nonexistent, injury to the people of Alabama generally.

C. The evidence at trial shows that these plaintiffs suffered no judicially cognizable injury at all.

The injury-in-fact in *Shaw* jurisprudence is not simply the placement of a voter in a particular district; rather it consists of the **consequences** to a voter of being placed in a district whose creation is the product of invidious race consciousness. This Court has identified four potential injuries:

(1) Over reliance on race may reflect the "offensive and demeaning" stereotypical "assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls,'" *Miller*, 515 U.S. at 911-12 (*quoting Shaw I*, 509 U.S. at 647), thereby ignoring voters' actual interests and preferences;

(2) Unjustified race-consciousness may "incite racial hostility" within the political process *Hays*, 515 U.S. at 744 (*quoting Shaw I*, 509 U.S. at 643);

(3) "[A] district obviously ... created solely to effectuate the perceived common interests of one racial group [may make] elected officials ... more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole," *Hays*, 515 U.S. at 744; and/or

(4) It may send a message that "political identity is, or should be, predominantly racial.'" *Bush v. Vera*, 517 U.S. 952, 980-81 (1996).

In each of the *Shaw* cases previously decided by this Court, the Court presumed the existence of the harms and their effect on plaintiffs, because the evidence showed that the districts in which they lived were configured predominantly on the basis of race. This evidence was sufficient to demonstrate standing on the part of plaintiffs, but the Court did not hold that its presumption was conclusive on the merits of whether plaintiffs had in fact suffered personal harm.

As we explained in the previous section, the district court in this case applied the same presumption to claims of plaintiffs who did **not** reside in the allegedly gerrymandered majority-black districts. This flatly violated the rule regarding standing announced by this Court in *Hays*. The district court's own fact findings belie any contention that the plaintiffs in this case actually suffered any of the harms this Court has identified.

First, the plan in this case did not reflect any stereotypical assumptions about African American voters. The court below recognized that "a large majority" of African-American voters in Alabama support candidates endorsed by ADC, ANSC and JCCC which enjoy great success in mobilizing their supporters to turn out at the polls. J.S. App. 25a.

Second, the plan was not one "created solely to effectuate the perceived common interests of one racial group." The ADC, ANSC, and JCCC all endorsed white as well as black candidates and achieved their goals through open political negotiation with white legislators and politicians. "[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

Third, the plan in this case does not convey any message that political identity is "predominantly racial." Rather, it reflects the undisputed reality that political identity in Alabama

is the product of voluntary affiliation and consistent support of political, not racial, organizations.

This evidence would be sufficient to rebut the presumption of injury to the individual plaintiff required by Article III even in a majority-black district that was the primary focus of race-conscious districting. That is, it would defeat the efforts of plaintiffs with standing to prove their case on the merits. In the instant action, this evidence undermined both the plaintiffs' standing to assert a *Shaw* claim and proof of any such claim on the merits.

II. This Court should note probable jurisdiction to clarify the relationship between the *Shaw* cause of action and the First Amendment rights of African-American voters to seek favorable districting plans through political negotiation and compromise.

The Constitution does not prohibit African Americans from associating politically to seek equity for blacks in the Legislature. To the contrary, in *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994), this Court directed minority voters to "pull, haul, and trade to find common political ground" in the reapportionment process. Far from condemning the results of a free and open process as violative of the Equal Protection Clause, federal courts should protect such negotiation as core First Amendment activity. But the district court in this case put *Shaw* on a collision course with the First Amendment, by making the very fact that the plan was the product of the State's negotiation with voluntarily created, predominantly black political organizations controlling evidence of unconstitutionality.

Dr. Reed and the ADC made no secret of the fact that their redistricting agenda encompassed an effort to preserve and to increase the number of majority-black districts, in order to provide equitable representation for blacks in elective offices in

Alabama. But advocacy of equitable representation is "core political speech," and "the advocacy of a politically controversial viewpoint ... is the essence of First Amendment expression." *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 347 (1995) (citations omitted); *accord, e.g., Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 916 (2000) (Thomas, J., dissenting) ("Political speech is the primary object of First Amendment protection."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position....").

Essentially, what the district court did in this case was to hold that citizens who choose to affiliate themselves with political organizations whose goal is to achieve fair representation for African Americans cannot enjoy the political benefits which their numbers and skillful politics have achieved on an equal basis with those who advocate districts for Republicans, or farmers, or suburbanites. The district court effectively ruled that the State of Alabama was constitutionally prohibited from negotiating with Dr. Reed and his constituents because of the content of their views on reapportionment. This repudiation of core First Amendment freedoms also violates the Civil War Amendments, as the state trial court noted, when it is directed against the descendants of slaves, who were excluded from the legislative redistricting process throughout Alabama's history, from its admission as a state in 1819 to the publication of the 1980 census.

The district court's holding that Dr. Reed's agenda constituted impermissible, proxied-race speech instead of political speech, simply because all supporters of ADC and other predominantly black political organizations in Alabama do not register as members, also conflicts with the axiom that the First Amendment protects a political organization's decision about how to constitute itself. *See generally California*

Democratic Party v. Jones, 530 U.S. __, __ (June 26, 2000), slip. op. at 6-7; *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214-15 (1986); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981)). The undisputed, overwhelming support black voters give ADC and ANSC at the polls "fairly can be described as an act of affiliation," *Jones*, slip op. at 10 n.8 (*quoting La Follette*, 450 U.S. at 130 n.2 (Powell, J., dissenting)). Indeed, if the state imposed a registration requirement on ADC to identify its members, that restriction itself would be subject to strict scrutiny, "because it burden[s] the 'associational rights of the Party and its members.'" *Tashjian*, 479 U.S. at 217 (*quoted in Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring)).

The evil the majority below perceived in the Reed-Buskey Plan was precisely the freedom of political association the First Amendment guarantees. It characterized the efforts of Dr. Reed and his associates to *aggregate* their constituents as an "act of *segregation*." J.S. App. 14a. By invalidating the negotiations between white legislators and officials and black political leaders, the lower court was effectively requiring the very state interference with political freedom that this Court recently held California is forbidden to engage in, namely, "changing the parties' message. We can think of no heavier burden' on a political party's associational freedom." *Jones*, slip op. at 14. In other words, the district court got it exactly backwards: black voters' effective exercise of political association in a free and fair political process leading to redistricting is entitled to constitutional protection; the restrictions the court below would impose on predominantly black political organizations and those who negotiate with them must be subjected to strict scrutiny.

If *Shaw* jurisprudence is to be reconciled with First Amendment law, plaintiffs must be required to allege facts and to adduce evidence which demonstrates that their assignment to a particular district actually produces the expressive harms this Court identifies as equal protection violations. Included in the *Shaw* plaintiffs' burden of proof must be convincing evidence that any intentional aggregation of black voters is based on racial stereotypes and is *not* the result of those voters' exercise of their freedom of political speech and association.

III. Because many redistricting plans are, and will be, challenged in both state and federal proceedings, this Court should note probable jurisdiction to clarify the standards for claim and issue preclusion.

Complementing the district court's boundless standing rule is its virtually limitless (mis)application of the principles of claim and issue preclusion. If it is left uncorrected, the decision below not only would permit *Shaw* claims to be pursued to trial against every one of the 105 House districts and 35 Senate districts in the Alabama Legislature, it would allow them to be brought in that many separate lawsuits. With regard to the questions of preclusion, as with issues of standing and questions on the merits, the district court's decision shows blatant disrespect for principles of federalism.

While this Court has rejected "'extreme' application[s] of state-law preclusion (res judicata) principles," *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167 (1999); *see also Richards v. Jefferson County*, 517 U.S. 793 (1996), this case involved quite conventional application of preclusion doctrine. The Thompson plaintiffs sought to represent a class identical to the class the Rices had sought to represent in *their* pleadings. Both the federal and state courts made special efforts in the Rices' proceedings to protect the interests of the Thompson plaintiffs. *South Central*, 526 U.S. at 167. The Thompson plaintiffs are in privity with the Rices, so they

cannot be deemed "strangers" to the Rices' state court action. *South Central*, 526 U.S. at 167-68.

The Thompson plaintiffs' lawyers made a deliberate forum-shopping decision when they sat on the their claims from at least September 1997 until February 1999. They made a calculated decision not to seek review by this Court of the judgment of the Supreme Court of Alabama, choosing instead to ask the federal district court to rule that the state courts had "violate[d] the Rice Plaintiffs' Fourteenth Amendment rights." Doc# 120, p. 2.

In short, the Rices and their privies successfully urged the court below to ignore full faith and credit and the *Rooker-Feldman* doctrine, both of which have heightened importance in the legislative redistricting context. "[A] party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. DeGrandy*, 512 U.S. at 1005-06 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923)). The decision below violates these precedents when it concludes that, even though the Thompson plaintiffs were in privity with the Rices, the state court judgments precluded neither their *Shaw* claims, nor the issue of mootness, nor the issue of whether political affiliation had been used impermissibly as a proxy for race.[8]

[8] The district court's attempt to apply *Hays* standing principles to define the limits of claim preclusion with respect to the *Shaw* cause of action also produced internally inconsistent rulings. On one hand, it concluded that Mr. Thompson's *Shaw* claim against his Senate district, shared with one of the Rices, was barred, but not his House district, because the Rices lacked standing to challenge another House district nested in their common Senate district. On the other hand, it ruled that Mr. Gunter did have standing to (continued...)

"[Alabama] can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer." *Growe v. Emison*, 507 U.S. at 35. The district court's holding that the Alabama Supreme Court's judgment of mootness did not subsume the possibility of special elections is patently wrong, and its disagreement with the state court's confidence in a timely redistricting after the 2000 census is published[9] displayed the same disrespect of both the legislative and judicial branches of state government this Court criticized in *Scott v. Germano*, 381 U.S. 407 (1965) (per curiam). *Growe*, 507 U.S. at 33. The lower court's conclusion that *Reno v. Bossier Parish School Bd.*, 120 S.Ct. 866, 871 (2000), has overruled the longstanding principle that federal courts apply state law to resolve questions of claim and issue preclusion is not only wrong, it is internally inconsistent with its later rejection of plaintiffs' request for a *Bossier Parish* remedy, because the issues about proper baselines under § 5 of the Voting Rights Act are not presented here. J.S. App. 11a-12a, 52a.

IV. This Court should note probable jurisdiction to resolve a conflict among the lower federal courts on the application of laches to *Shaw* claims brought shortly before the end of a districting plan's life.

On the same day that the court below entered its final judgment, this Court affirmed the dismissal of a *Shaw* challenge to congressional districts in Florida on the ground of laches. *Chandler v. Harris*, __ U.S. __, 120 S.Ct. 1716 (2000), *aff'g*

[8](...continued)
challenge his Senate district, based solely on his contention that another House district nested with his House district was racially gerrymandered.

[9] In fact, as the record shows, timely redistricting was accomplished by the Alabama Legislature after the 1980 census and by the Alabama judiciary after the 1990 census.

per curiam Fouts v. Harris, 88 F.Supp.2d 1351 (S.D. Fla. 1999). Two other federal courts recently have held that laches bars *Shaw* claims brought this late in the decade. *Sanders v. Dooly County*, __F.Supp.2d __, CA No. 98-00412-CV-2-DF-5 (M.D. Ga., May 11, 2000), appeal pending No. 00-12850-H (11th Cir.) (county commission and school board districts); *Maxwell v. Foster*, __ F.Supp.2d __, CA No. 98-1378 (W.D. La., Nov. 24, 1999) (3-judge court) (state legislative districts).[10]

In this sensitive political area, there should be principled uniformity respecting when it is too late for federal courts to review redistricting plans, particularly after the last regular elections using those plans have passed. The lower court here did not cite reasons for rejecting the defense of laches which would distinguish the circumstances of this case from the three others cited above. Indeed, it failed entirely to explain any justification for allowing the Thompson plaintiffs to proceed in federal court after they spent more than a year waiting for the state court to decide the Rices' claims. Nor did it ever explain why the Thompson plaintiffs are not guilty of delay for ignoring the judicial invitations for them to proceed in state court.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

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[10] Copies of these two decisions have been lodged with the Clerk and served upon opposing counsel.

Respectfully submitted,

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